

**Kaneka Paste Polymers Sdn Bhd v
Director General of Industrial Relations & Ors**

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO R1–25–92 OF
2003

RAUS SHARIF J
18 APRIL 2005

Administrative Law — Remedies — Certiorari — Application to quash decision of Director General of Industrial Relation — Whether decision of DGIR subjected to review under O 53 r32(2) of the Rules of the High Court 1980 — Industrial Relation Act 1967 ss 9(1) & (5)

Labour Law — Trade union — Recognition — Whether decision of DGIR subjected to review under O 53 r 32(2) of the Rules of the High Court 1980 — Industrial Relation Act 1967 ss 9(1) & (5)

This was an application for leave under O 53 r 3(2) of the Rules of the High Court 1980 ('RHC') for an order of *certiorari* to quash a decision by the the Director General of Industrial Relation ('DGIR'). The senior federal counsel for the Attorney General raised a preliminary objection against the applicant's application on the ground that the application was premature and that the DGIR's decision was merely an administrative process towards the Minister's decision and therefore was not amendable to judicial review. The applicant contended that: (1) they were entitled to challenge the decision of the DGIR because the DGIR was the only person who had the power to make the decision; and (2) the decision of DGIR under s 9(4B)(b) of the Industrial Relation Act 1967 ('the Act') and the decision of the Minister under s 9(5) of the Act were two separate decisions.

Held, dismissing the application with cost:

The decision which can be reviewed under O 53 of the RHC must be the decision of the Minister under s 9(5). Section 9(1) to s 9(4C) merely prescribes the procedures to be taken by the DGIR and the DGTU. But the power to grant recognition can only be made by the Minister under s 9(5). For a decision to be subjected to judicial review, it must go beyond what is merely administrative or procedural (see para 9).

[Bahasa Malaysia summary]

Ini adalah satu permohonan untuk kebenaran di bawah A 53 k 3(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk satu perintah *certiorari* membatalkan keputusan Ketua Pengarah Perhubungan Perusahaan ('DGIR'). Peguam kanan persekutuan bagi Peguam Negara telah membangkitkan satu bantahan permulaan terhadap permohonan pemohon atas dasar bahawa permohonan

- A** itu pra-masa dan keputusan DGIR hanya merupakan satu proses pentadbiran kepada keputusan Menteri dan oleh itu tidak boleh dipinda melalui kajian semula kehakiman. Pemohon menuntut bahawa: (1) mereka berhak membantah keputusan DGIR kerana DGIR adalah orang yang mempunyai kuasa untuk membuat keputusan itu; dan (2) keputusan DGIR di bawah s 9(4B)(b) Akta Perhubungan Perusahaan 1967 ('Akta tersebut') dan keputusan Menteri di bawah s 9(5) merupakan dua keputusan berasingan.

Diputuskan, menolak permohonan itu dengan kos:

- C** Keputusan yang boleh dikaji semula di bawah O 53 KMT adalah keputusan Menteri di bawah s 9(5) Akta itu. Seksyen 9(1) s 9(4C) Akta itu hanya memperuntukkan prosedur-prosedur yang patut diambil oleh DGIR dan DGTU. Tetapi kuasa untuk memberi pengiktirafan hanya boleh dibuat oleh Menteri di bawah s 9(5) Akta itu. Bagi satu keputusan dikaji semula kehakiman, ia mesti melebihi perkara pentadbiran dan prosedural (lihat perenggan 9).]

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Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 185–393.

E **Legislation referred to**

Industrial Relations Act 1967 s 9, (1), (2), (4B)(b), 4C, (5)
Rules of the High Court 1980 O 53 r (2)

- F** *A Ramadass (M Jothi Letchimy with him) (Ramadass & Associates) for the applicant. Azizah Haji Nawawi (Senior Federal Counsel) (Attorney General's Chambers) for the respondent.*

Raus Sharif J:

- G** [1] This is an application by the applicant for leave under O 53 r 3(2) of the Rules of the High Court 1980 ('RHC') for an order of certiorari to quash the decision of the first respondent, the Director General of Industrial Relation ('DGIR') dated 29 March 2003. The DGIR, had on 29 March 2003 by way of a letter informed the applicant that an investigation was conducted on the competency of the third respondent ('the Union') to represent the workers of the applicant company and it had been decided that the workers fell within the membership scope of the Union.

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[2] The facts leading to this application are these. On 1 June 2001, the applicant company received from the Union a letter dated 17 May 2001 together with Form A and Rules of the Union, claiming for recognition from the applicant by virtue of s 9(2) of the Industrial Relation Act 1967 ('the Act').

I The applicant refused to accord recognition as the applicant was not certain as to whether the Union was competent to represent the workers of the applicant.

[3] On 26 June 2001 the applicant wrote to the DGIR to investigate the competency of the Union to represent the workers in the applicant company. The competency check was done by the second respondent, the Director General of the Trade Union ('DGTU') pursuant to s 9(4B)(b) of the Act. The DGTU officers conducted an investigation on the activities of the applicant company on 14 February 2002.

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[4] In a letter dated 29 March 2003, the DGIR informed the applicant that the competency check made on 14 February 2002 confirmed that the Union is competent to represent the workers working with the applicant.

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[5] Before me, the learned senior federal counsel for the Attorney General raised a preliminary objection against the applicant's application on the ground that the application was premature. It was submitted by the learned senior federal counsel that the DGIR's decision was merely on administrative process towards the Minister's decision whether or not to accord the Union recognition under s 9(5) of the Act. As such, according to the learned senior federal counsel, the DGIR's decision was not amendable to judicial review.

C**D**

[6] The applicant contended otherwise. It was the submission of the applicant that they were challenging the determination by the DGIR that the Union was competent to represent the workers of the applicant company. According to the applicant they were entitled to challenge the decision of the DGIR because the DGIR is the only person who have the power to make the such decision. To the applicant, the decision of DGIR under s 9 (4B)(b) and the decision of the Minister under 9(5) of the Act are two separate decisions.

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[7] To understand the argument put forward by both parties, it would be necessary to examine the whole procedure for seeking recognition under s 9 of the Act. For ease of reference s 9 is hereby reproduced:

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9(1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say:

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- (a) managerial capacity;
- (b) executive capacity;
- (c) confidential capacity; or
- (d) security capacity,

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may seek recognition or serve an invitation under s 13 in respect of workmen employed in any of the abovementioned capacities.

- (1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union or workmen or by an employer or by a trade union of employers.

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- A** (2) A trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.
- B** (3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim:
- (a) accord recognition; or
- (b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds for not according recognition; or
- C** (c) apply to the Director General to ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union of workmen concerned and give a written notice of such application to such trade union of workmen.
- D** (4) Where the trade union of workmen concerned receives a notification under sub-s (3)(b), or where the employer or trade union of employers concerned fails to comply with sub-s (3), the trade union of workmen may report the matter in writing to the Director General.
- (4A) The Director General, upon receipt of a reference under sub-s (1A), or an application under sub-s (3)(c), or a report under sub-s (4) may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.
- E** (4B) For the purpose of carrying out his functions under sub-s (4A) the Director-General:
- (a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant; and
- F** (b) may refer to the Director General of Trade Unions for his decision any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director-General of Trade Unions under this paragraph
- G** shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions.
- (4C) Where the matter is not resolved under sub-s (4A) the Director General shall notify the Minister.
- H** (5) Upon receipt of a notification under sub-s (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case may be, as from such date as the Minister may specify; a decision of the Minister under this subsection may include a decision as to who are workmen employed in a managerial, executive, confidential or security capacity.
- I** (6) A decision of the minister under sub-s (5) shall be final and shall not be questioned in any court.

[8] Looking at the whole scheme of s 9 above, I am in agreement with the learned senior federal counsel that the decision which can be reviewed under O 53 of the RHC must be the decision of the Minister under s 9(5). Section 9(1) to s 9(4C) merely prescribes the procedures to be taken by the DGIR and the DGTU. But the power to grant recognition can only be made by the Minister under s 9(5). No doubt the decision of DGTU conveyed to the applicant in a letter dated 29 March 200 was made under statutory authority, but not all decision made under statutory authority is subject to judicial review. To me, for a decision to be subjected to judicial review, it must go beyond what is merely administrative or procedural. Moreover in this case the process for the Union recognition is midway before the decision of a Minister under s 9(5). To entertain the applicant's application would hamper the smooth workings of a claim for recognition as it allows piece meal attacks at every stage of the decision process. Thus, the process for recognition should be allowed to proceed to enable the Minister to decide on the matter as provided by s 9(5).

[9] In conclusion, I am of the view that the applicant should wait until the decision of the Minister under s 9(5). If the Minister's decision is not in the applicant's favour, only then the applicant should make the challenge and in the process challenge the decision of the DGIR and DGTU on the issue of competency check. There should only be one challenge and not several challenges.

[10] For the above reasons, I allowed the preliminary objection raised by the respondents and accordingly dismissed the applicant's application with costs.

Application dismissed with costs.

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